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# Major Tribunal Decisions in 1990

GRAHAM F. SMITH\*

The year 1990 did not bring forth any cases in the industrial jurisdiction that attracted the public's attention as much as did the Pilots Case<sup>1</sup> in 1989. Nevertheless there have been some decisions brought down by the Australian Industrial Relations Commission ('the commission') that may well have much greater long-term significance than did the Pilots Case. These decisions can be categorized into two distinct areas. In the first place, in a series of decisions the commission has developed important principles about the operation of section 118 of the *Industrial Relations Act 1988* (Cwlth), and these decisions require analysis because they affect the parameters of the Australian Council of Trade Unions (ACTU) strategy of rationalizing trade union structures. The second field of the commission's decisions of significance during 1990 was parental leave. In this regard a series of decisions in what is known as the Paternity Leave Test Case<sup>2</sup> were handed down.

The High Court of Australia also handed down a number of decisions of significance in the industrial relations context, and two of those are chosen here for discussion. The first, known as the Charles David<sup>3</sup> Case, has implications about the relationship between the commission and the Federal Court of Australia, and also adds momentum to renewed calls for the establishment of a specialist labour court. The second High Court decision, *Dobinson v. Crabb*,<sup>4</sup> is yet another, and perhaps a last gasp, attempt by the Builders Labourers Federation (BLF) to rewrite Australia's industrial jurisprudence in this, the highest court in the land. Apart from the involvement of the BLF, its significance lies in its analysis of the legal and financial status of a deregistered federal union. It also contains dictum about the troubled question of the application of section 109 of the Australian Constitution when federal and state laws appear to conflict.

The remaining two decisions discussed both emanate from the Victorian Supreme Court. The two decisions, *Casamento Management Pty Ltd v.*

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1. *Ansett Transport Industries (Operations) Pty Ltd v. Australian Federation of Air Pilots* (1989) Australian Torts Reports 80-290, 80-303.
2. *FMWU v. Angus Nugent & Son Pty Ltd* (1990) 32 ALR para. 284 (full bench of Industrial Relations Commission, Cohen J, Moore and Polites DPP, Griffin and Turbet CC, 26 July 1990, Print J3596). The same full bench handed down its decision regarding the final form of the parental leave clause on 16 November 1990 (Print J5512).
3. *O'Toole v. Charles David Pty Ltd* (1990) 64 ALJR 618.
4. (1990) 64 ALJR 501.

*Garlick*<sup>5</sup> and *Trans Waste Pty Ltd v. Marsh and Downey*,<sup>6</sup> both concern the growing unfair dismissal jurisdiction of the Industrial Relations Commission of Victoria. (As is an ever-present danger in reviews of the previous year's decisions, it may be that these decisions will be overturned prior to this analysis being published. In late 1990 the High Court of Australia heard an appeal against the decision of the Victorian Supreme Court in the *Trans Waste* Case and a decision is expected some time in early 1991.)

### The Paternity Leave Test Case

The designation 'Paternity Leave Test Case' is a misnomer, if one considers the range of matters the Industrial Relations Commission was asked to deal with in this case. A far more accurate and less pejorative title for this case would be 'Parental Leave Test Case', because in essence all of the claims made by the ACTU related to the rights of parents (not just men) under federal industrial awards to take a variety of types of leave related to the birth, adoption and care of children under two years of age over whom the employees have parental responsibilities.

The ACTU, on behalf of its affiliates, brought the test case to extend existing maternity and adoption leave provisions in private sector industrial awards so that these rights are generally available to men as well as to women. Existing maternity leave and adoption leave provisions were only available to female employees, and only as unbroken periods of leave of not more than fifty-two weeks. The ACTU submitted that changes which have taken place regarding the role of men and women respecting the care and upbringing of children, changes in the composition of the workforce, in social attitudes, in provisions for parental leave in other countries and in international standards (such as ILO Convention 156 and Recommendation 165) had resulted in existing maternity leave and adoption leave provisions becoming outdated. It was also argued by the ACTU that the existing provisions discriminated against men and that the commission had a duty under section 93 of the *Industrial Relations Act 1988* to take account of the principles contained in the *Sex Discrimination Act 1984* (Cwlth).

The ACTU's claims were opposed by the Confederation of Australian Industry (representing the respondent employers) and there were numerous interveners, including the Commonwealth minister for industrial relations, the states of Queensland, New South Wales, Victoria, Tasmania, South Australia, Western Australia, the Northern Territory and the Australian Capital Territory, as well as the Metal Trades Industry Association, the Human Rights and Equal Opportunity Commission, the Australian Institute of Family Studies, the Women's Electoral Lobby of Australia, Parents Without Partners Victoria, the Australian Early Childhood Association, the National Women of Australia, the United Nations Association Status of Women Committee and the Union of Australian Women. Most of these interveners supported the substance of the ACTU's claims.

It is convenient at this point to state in more detail the ACTU's claims. They were:

1. Paternity leave

A claim for up to fifty-two weeks' unpaid leave to be available in two periods:

- (a) 'short paternity leave'—up to three weeks' continuous leave following the birth of the child;
- (b) the balance to be taken in an unbroken period after the short paternity leave and before the child's second birthday (to be known as 'extended paternity leave').

2. Maternity leave

A claim that the existing period of fifty-two weeks' maternity leave be broken into two:

- (a) the first period to consist of any leave taken before the birth and six weeks' compulsory leave following the birth of the child (to be known as 'short maternity leave');
- (b) the remainder of the fifty-two weeks to be taken in an unbroken period between the seventh week after the birth and the child's second birthday (to be known as 'extended maternity leave').

3. Adoption leave

A claim to vary the standard (existing) prescription:

- (a) to extend the entitlement to male employees;
- (b) to provide for a period of leave to travel overseas for the purpose of taking custody of the child;
- (c) to provide for a period of three weeks' leave to be taken from the time of the placement of the child (this, plus leave taken under (b) above, to be known as 'short adoption leave'); and
- (d) the balance of fifty-two weeks to be taken in an unbroken period at any time thereafter prior to a date two years after the placement (to be known as 'extended adoption leave').

4. Part-time leave

A claim to include provisions which would allow parents who qualify for parental leave to work part-time for a period of up to two years from the birth of a child, or its placement in the case of adoption. The right to part-time leave under this clause to operate in areas where there is no award provision for part-time employment and independently of any restrictions in awards regulating part-time employment.

5. Special family leave

This was a claim for up to five days' unpaid leave for absences relating to the health or school requirements of a child. The ACTU did not pursue this claim, but told the commission that it would bring it back to the commission after the parental leave issues (1, 2, 3 and 4 above) had been determined.

The commission did not grant all of the ACTU's claims, but granted them in a modified form after taking into account the evidence and the opposition of the Confederation of Australian Industry.

### *The evidence*

One of the most important features of this decision for readers of this journal is the wealth of evidence put before the commission about the changing roles of men and women at work and at home, and as primary care-givers to children. Much of the evidence was taken from a study conducted by the Australian Institute of Family Studies entitled *Maternity Leave in Australia*. This study analyzed the results of surveys conducted by the institute, which showed some surprising results. First, the surveys showed that a far higher proportion of women in the public sector (76 per cent) who were entitled took up maternity leave than did women in the private sector (21 per cent). Secondly, it was shown that there had been a significant increase in the employment of married women with children under five years of age (44.7 per cent in 1988 compared with 31.8 per cent in 1981), perhaps largely because of the increasing availability of part-time work. Less surprising, but no less importantly, the evidence showed that 59 per cent of 'partnered' women had partners who took leave at the time of the birth of the child, and further, that there were some 75 000 men in Australia who have the responsibility for the primary care of dependent children, some 8500 of those caring for children under four.

A substantial amount of documentary material, designed to show that Australia lagged behind most industrialized countries in relation to entitlements to parental leave (for men), was also placed before the commission.

### *The Confederation of Australian Industry arguments*

The Confederation of Australian Industry opposed the ACTU's claims largely on two grounds. Firstly, it said that the claim was not about an industrial issue, that what was really being sought was the commission's encouragement of greater involvement of men in child-rearing, and that this was directed to changing social attitudes and behaviour and not to resolving an industrial issue. The confederation also argued, in this vein, that there is little industrial need for a prescription for paternity leave. It was said that employer surveys showed that most employers accommodated employees' requests for time off when their partner was having a child and that in any case, other evidence showed very low take-up rates for paternity leave where it was available in awards. The second ground for the confederation's opposition was cost: it argued that there would be substantial costs both at the national level and at the level of individual employers, if the ACTU's claims were granted. The confederation's arguments were directed particularly at the ACTU's claim that both partners would be able to fully exercise their parental leave rights in respect of the same child. In other words, that, for instance, one or the other of the partners could be on leave for a continuous period of up to two years. The confederation argued that granting the claim in this form would involve a much greater period in aggregate during which employees would be out of the labour force; at the level of individual employers, costs associated with the need to locate and train replacement employees would increase. It was also argued that disruption and associated costs would be increased if periods of parental leave were allowed to be broken and if entitlement to leave could be taken during a period of two years. The confederation argued that, rather

than extend the parental leave provisions in the manner sought, the commission should broaden award provisions relating to part-time employment as a means of creating a framework within which men and women could equally carry out family responsibilities while participating in the workforce.

### *The decision*

The commission accepted the claim for short paternity leave. The form of leave approved is for a period of up to one week, and is unpaid. Its purpose is to allow a father to assist his spouse and care for the family at the time of the birth of their child. Where awards already provide for paid or unpaid paternity leave for this purpose, however, the new paternity leave right is not in addition to those existing rights.

The claim for extended paternity leave was allowed in part. Extended paternity leave will be allowed for an unbroken period of up to fifty-one weeks, unpaid, and will be in addition to short paternity leave. The leave will not extend beyond the child's first birthday. In a major victory for the Confederation of Australian Industry, the commission ruled that, except for the week available at the time of the birth (short paternity leave), paternity leave shall not be taken concurrently with the spouse's maternity leave, and for each week of extended paternity leave taken, the male employee's spouse's maternity leave will be reduced by one week. In other words the total (extended) parental leave available to the parents of any one child is fifty-one weeks. The commission said that 'as the leave is being granted for the purpose of child care, we did not consider it appropriate, where both parents are in the workforce, that they should be absent from their employment on maternity and paternity leave at the same time'.<sup>7</sup> The commission went on to say:

Our decision might not meet the needs of all families, particularly having regard to the limited availability of child care for children under two years. However, we are required by s. 90 of the Act to take into account the public interest and in particular the economic impact of our decisions. We are concerned about the cost implications of the claim.<sup>8</sup>

The commission also rejected the claim that maternity leave be able to be broken into two parts. In its view, maternity leave, paternity leave and adoption leave address different circumstances.

Maternity leave recognises the special industrial interests of female employees who elect to combine motherhood with continued participation in the workforce. The existing provisions are directed to the protection of the mother's health before and after the birth and the care of the new born child.<sup>9</sup>

The commission accepted that both male and female employees ought to have equal rights as regards adoption leave. Thus, the claim as set out earlier was granted, save that a joint total of fifty-two weeks' extended paternity leave is permitted for both adopting parents and may not be taken concurrently. As well, the three weeks' short adoption leave, while it may be taken by both

7. 32 AILR para. 284 at 278. Downloaded from [sagepub.com](https://www.sagepub.com) at University of Newcastle on June 18, 2012

8. *ibid.*

9. 32 AILR para. 284 at 278.

parents concurrently, is to be the only leave available at the time of the placement of a child, and this expressly includes any time taken to travel overseas to take custody of the child.

The commission very pointedly expressed the view that it favoured the submission of the Confederation of Australian Industry that 'part-time work should be more generally available for both men and women'.<sup>10</sup> It expressed reservations about the limited nature of the claim here, that special rights to part-time work only be available until the second birthday of the child or the second anniversary of the placement of an adopted child. The commission said:

The need for part-time employment for one or both of the parents may not diminish until the child, or the last of any subsequent children, reaches school age and even beyond. All of which suggests that part-time work should continue to be available after the second birthday of the child.<sup>11</sup>

However, because the issue of wider rights to part-time employment was not fully argued, the commission largely accepted the ACTU's limited claim. The specific scheme for what might be coined 'parental part-time employment' is that it may be taken in conjunction with or independently of any maternity, paternity or adoption leave. It may only be taken by agreement with the employer and provided the employee has given more than twelve months' continuous service before commencing the part-time work, that employee has a right (which may only be exercised once) to return to his or her former (full-time) position, provided he or she exercises that right prior to the second birthday of the child or the second anniversary of the placement of an adopted child. An employee working part-time under this clause is to receive pro rata all award benefits.

The commission added a rather novel touch to this part of its decision. It introduced a provision that requires the employer and employee to record the essential elements of the part-time employment before it commences. The commission stated that it believed it to be desirable that the parties to such employment should have a clear understanding of the terms upon which part-time work would be performed. This provision requires the terms of the agreement, or any variation to it, to be committed to writing and retained by the employer. Further, a copy of the agreement and any variation is to be provided to the employee by the employer. The wider significance of this development should be obvious. Because many contracts of employment governed by award provisions are merely oral contracts, misunderstandings arise frequently as to the precise nature of the contract, even to the extent that doubts arise as to the correct classification applying to the work to be performed. Misunderstandings about the contents of contracts of employment led in Britain in 1965 to the introduction of statutory provisions requiring the employer to record the terms of the contract of employment (in quite some detail) at the commencement of employment and to provide these details in writing to employees. It has long been thought that there should be similar

10. 32 AILR para. 284 at 280. Downloaded from [jir.sagepub.com](http://jir.sagepub.com) at University of Newcastle on June 18, 2012

11. 32 AILR para. 284 at 280.

requirements in Australia. The fact that the commission has been prepared to make award prescription along these lines, even to this limited extent, indicates that it might and perhaps should do so more generally.

One other rather novel aspect of the part-time work provision is that the commission ruled that an employer may not require a part-time employee to work overtime. The commission said that 'as parents working part-time may make arrangements for child care which depend upon definite commencing and finishing times, we have decided that employees working part-time under this clause should be exempted from any requirement to work overtime'.<sup>12</sup> It may, however, be legitimately asked whether this restriction should apply only to part-time employees. What of parents working full-time (especially single parents) who also have inflexible child-care arrangements?

### *Implementation and further implications*

The Industrial Relations Commission attached a draft clause to its initial decision, invited the parties to consider the package and stated that they would be given an opportunity to make further submissions before the final version was settled. Subsequent hearings did occur, and a final draft was published on 16 November 1990.<sup>13</sup> Further implementation will now require individual trade unions to serve appropriate logs of claim and seek variations to awards in the terms of the provisions published on 16 November 1990.

It seems there are at least two outstanding matters of substance which will now fairly quickly come back to the commission. The first is a likely test case on a more general right to part-time employment. The second is the deferred claim for five days' special family leave for absences relating to the health or school requirements of a child. Moreover, given the rapid changes taking place in terms of the gender composition of the workforce, it may only be a matter of time before claims regarding matters such as the provision of workplace-based child-care also arise.

### **Section 118 of the *Industrial Relations Act***

Upon the enactment of the *Industrial Relations Act 1988* (Cwlth) several provisions in that Act evoked considerable excitement amongst bodies such as the Business Council of Australia because of their potential to bring about significant changes in institutional industrial relations in Australia. These provisions were sections 115 and 118, and there is little doubt that their combined operation provides a potentially powerful tool in the process of rationalizing union structures and in the development of single-union enterprise bargaining.

Section 115 is the certified agreements provision, which permits the Industrial Relations Commission to certify agreements entered into between unions and employers, provided the commission is of the opinion that it is not contrary to the public interest to certify the agreement. More significantly, section 115(5) provides that certification 'shall not be taken to be contrary

12. *ibid.*

13. See footnote 2.

to the public interest merely because the agreement is inconsistent' with the wage fixing principles. Moreover, the terms of a certified agreement prevail over the terms of an award that might otherwise apply. Thus, there is scope for an employer to negotiate enterprise-specific work practices and other conditions of employment that would otherwise be inconsistent with relevant awards. A major difficulty, however, is that many employers have multi-union representation within their enterprises and it will often be difficult to negotiate novel arrangements with so many unions involved. This is where section 118 comes into play. It permits the commission to restructure union representation at either industry or enterprise level. In order to explain how this can be achieved, and also by way of background to the decisions to be discussed shortly, it is helpful to set out, in part, the provisions of section 118 as it existed until amendment in December 1990. It provided that:

118(1) The powers of the Commission in relation to demarcation disputes are exercisable only by a Presidential Member or a Full Bench.

(2) The Commission may seek advice from an appropriate peak council about the timing of the exercise of any of the Commission's powers in relation to a demarcation dispute.

(3) Without limiting the powers of the Commission in relation to demarcation disputes, the Commission may, for the purpose of preventing or settling a demarcation dispute . . . make one or more of the following orders:

(a) an order that an organisation of employees shall have the right, to the exclusion of another organisation or organisations, to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation;

(b) an order that an organisation of employees that does not have the right to represent under this Act the industrial interests of a particular class or group of employees shall have that right;

(c) an order that an organisation of employees shall not have the right to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation.

(4) In considering whether to make an order under subsection (3), the Commission shall have regard to any agreement of which the Commission becomes aware that deals with the right of an organisation of employees to represent under this Act the industrial interests of a particular class or group of employees.

Of most significance is section 118(3)(b) because it allows the commission to hand over to a union, coverage which it previously did not have. There was no equivalent to this subsection in the Conciliation and Arbitration Act.

Despite the apparent breadth of the powers contained in sections 115 and 118 there were initially many doubts about the extent to which anything would really change. This caution was based on a number of factors. Firstly, it was initially thought that the union movement would be resistant to major union rationalization. Of course this view quickly evaporated once the Kelty plan for twenty big unions gained prominence. A second reason for caution was that the essential ingredients of sections 115 and 118 had always been there. We had for a long time had provisions for the making of consent awards and certified agreements (albeit in different form) and section 142A of the Conciliation and Arbitration Act contained provisions largely identical to

sections 118(3)(a) and (c). Yet surprisingly the power contained in paragraph (c) to deprive a union of its representation rights had only rarely been exercised. Moreover, it had never been done where a union had a long history of coverage and an active membership. The third reason for caution was that in 1988 the structural efficiency principle was new and the decentralization brought about by award restructuring had not yet occurred.

As many readers will be aware, the doubters were wrong, and sections 115 and 118 have begun to play a significant role in the restructuring of Australian industrial relations. A string of commission decisions utilizing section 118 have sent tremors through many sectors of the union movement and have forced the pace of many union amalgamations.

The first, and most significant, decision on the scope of section 118 was the decision of a full bench of the Industrial Relations Commission in *Federated Ironworkers Association v. Comalco Aluminium Ltd ('Southern Aluminium')*.<sup>14</sup> This case came too late for analysis in my survey last year (it was handed down on 15 December 1989) and so it is appropriate to use it to begin the analysis of the section 118 decisions.

Comalco Aluminium had a majority interest in a joint venture known as Southern Aluminium Pty Ltd (Southern Aluminium). Southern Aluminium built a road wheel manufacturing plant at Bell Bay in Tasmania, which commenced production in July 1989. It was a new plant, a greenfields site, and it wanted all of its production workers to be members of only one union. In order to achieve this, Southern Aluminium concluded an agreement with the Federated Ironworkers Association under which maintenance workers (who had traditionally been members of the Amalgamated Metal Workers Union and the Electrical Trades Union), could also perform production functions and likewise production workers (who had traditionally been members of the Ironworkers) could also perform minor maintenance tasks. The aim of the agreement was to 'create a multi-skilled and flexible workforce'. The Ironworkers and Southern Aluminium asked the commission to certify the agreement under section 115 of the Act. However, the Electrical Trades Union and the Metal Workers opposed the certification of the agreement and ultimately the matter came before a full bench of the commission which dealt with the matter by determining whether orders should be made under section 118 or not.

The primary contention of the Metal Workers and the Electrical Trades Union was that the Ironworkers were not entitled to enrol production workers who were primarily engaged in maintenance work and that from this a number of consequences followed which were fatal to the commission's jurisdiction under section 118. In the first place, it was said that the Ironworkers Association could not create an industrial dispute in respect of classes of workers whom it was unable to enrol as members. Secondly, no relevant demarcation dispute could exist in respect of employees whom the association was unable to enrol and, finally, an order could not be made under section 118(3)(b) to exclude Metal Workers Union and Electrical Trades Union coverage when the Ironworkers did not itself have coverage.

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After an exhaustive analysis of the eligibility rule of the respective union the full bench determined that the Ironworkers did not have coverage of the workers primarily engaged in maintenance functions. It ruled that nevertheless had jurisdiction to make orders under section 118 to remove the Mechanical Workers and Electrical Trades Union coverage over the maintenance work and to grant exclusive coverage of those workers to the Ironworkers. In part this ruling was based upon the view of the full bench that it could deal with a demarcation dispute (such as this) which was not an interstate industrial dispute in the constitutional sense. They referred in this respect to the dicta of Justice Murphy in *R. v. Turbet; Ex parte Australian Building Construction Employees and Builders Labourers Federation*,<sup>15</sup> that the commission's power to deal with demarcation disputes was based on the incidental power in the Constitution rather than on the conciliation and arbitration power. It is interesting to note that the views of the full bench in this regard seem in accord with those expressed more recently by Justice McHugh of the High Court in *Re Hancock; Ex parte Australian Federation of Air Pilots*.<sup>16</sup> The full bench also determined that it could make orders under section 118 permitting the Ironworkers, to the exclusion of the Electrical Trades Union and the Mechanical Workers, to represent the maintenance workers even though the Ironworkers did not presently have coverage of those workers. Most significantly from an industrial relations perspective, the full bench also decided that it should make such orders. Its reasons for doing so are worth quoting:

The plant is one that may well assume some significance to the economy of Tasmania and the country as a whole. Southern Aluminium intends to take advantage of the fact that they can, from the outset, influence the way in which the workforce is deployed and that they can therefore create a multi-skilled and flexible workforce from the time the plant commences operations. Southern Aluminium expresses the desire to have one registered organisation of employees represent the production employees. We can see that there are sound industrial relations reasons for adopting that position and it is an objective which is sought to be achieved by Southern Aluminium before patterns of industrial representation are entrenched and before there are existing employees with established allegiances to particular organisations in the context of that employment.<sup>17</sup>

The full bench did, however, sound some warnings to other employers and unions seeking to follow the same path as did Southern Aluminium and the Ironworkers. It said that if agreements were negotiated privately and not made public at the time of section 118 proceedings, disputes could be created rather than prevented. It said that it would be highly desirable for parties to approach the commission 'at an early stage to resolve demarcation issues rather than at a stage when an agreement has been finalised'.<sup>18</sup> The full bench also indicated that it might have taken a different approach if this had been a greenfields site. They said:

15. (1980) 144 CLR 335 at 350.

16. (1990) 64 ALJR 615 at 617.

17. 30 IR 241 at 258-9.

18. At 259.

Had we been confronted with evidence of a workforce with established allegiances then our task would have been more difficult. The use that might be made by the Commission of its powers under s. 118, in settling or preventing demarcation disputes, to rationalise industrial representation and, where appropriate, establish single or limited union representation at an enterprise has to be carefully balanced with the rights of existing employees to be represented by an organisation of their choice.<sup>19</sup>

For technical reasons the full bench did not immediately certify the agreement but it nevertheless said that there was nothing in 'substantive terms of the agreement in its current form which would . . . inhibit its certification'.<sup>20</sup>

The next decision on section 118 also involved the Federated Ironworkers Association. Known at the *Olex Cables Case*,<sup>21</sup> it involved an attempt by the association to expand its coverage of workers in the cable making industry at the expense of the National Union of Storeworkers, Packers, Rubber and Allied Workers (NUW). In his decision, Justice Munro largely accepted the principle expounded in *Southern Aluminium* that where section 118 orders would upset existing patterns of representation and thereby create, rather than prevent, disputes, such orders should not be granted. Thus the Ironworkers failed, and the NUW was successful in obtaining orders under section 118(3)(a) excluding the Ironworkers from coverage in some areas where both unions had previously had coverage. It appeared likely, on the basis of *Olex Cables*, that section 118 could have a marked impact only in relation to greenfields sites. But in three subsequent decisions this conservative view of section 118 was undermined. In each of these decisions the commission stripped unions of coverage and granted other unions exclusive coverage even though there were long-established patterns of industrial representation by those unions. The three decisions are the Container Terminals Case,<sup>22</sup> the Paint Industry Case<sup>23</sup> and the Australian Federal Police Case.<sup>24</sup> In the Container Terminals Case the Waterside Workers Federation was given exclusive representation of labouring, clerical and maintenance workers in container terminals to the exclusion of the NUW. In the Paint Industry Case the Federated Miscellaneous Workers Union was granted exclusive coverage of a large number of classifications of workers in the paint industry to the exclusion of the NUW, and in the Australian Federal Police Case eight unions which had previously had coverage of employees within the Australian Federal Police (mostly civilians) were excluded from that coverage and the Australian Federal Police Association was given exclusive coverage to represent all employees of the Australian Federal Police.

19. At 260.

20. At 261.

21. *Olex Cables v. National Union of Storeworkers, Packers, Rubber and Allied Workers*, AIRC, Munro J, 16 February 1990, unreported (Print J1534).

22. *The Association of Employers of Waterside Workers v. The Waterside Workers Federation of Australia*, Polites DP, 25 July 1990, unreported (Print J3618).

23. *FMWU v. NUW*, Munro J, 31 August 1990, unreported (Print J4165).

24. *Australian Public Service and Broadcasting Union v. Australian Government Employment v. Australian Federal Police*, AIRC, Williams and Cohen JJ, Oldmeadow C, 1 November 1990, unreported (Print J5780).

Curiously, the ACTU and the Commonwealth minister for industrial relations initially supported an application by the NUW to appeal the Paint Industry decision to a full bench of the commission. But later, the minister and the ACTU withdrew their support for the appeal, and leave to appeal, which had been granted, was later revoked by a full bench.

The trend of decisions on section 118 suggests that the commission is becoming more adventurous, and very quickly. Clearly, many commission members now perceive that the commission has a role to play in the restructuring of Australian unionism and union coverage. This is also a role which is jealously guarded by the ACTU, so the potential for rifts developing between the ACTU and the commission is ever-present. Indeed, according to media speculation, such rifts have already developed over this very issue. It is also clear from these decisions that if the commission were to adopt the Kely plan for 'principal unions, significant unions and other unions' section 118 could be used to accelerate the restructuring of Australian trade unions along these lines. Certainly unions in the 'other unions' category have real cause to be concerned about their future.

A final word should be said about the amendment to section 118 in December 1990 by the *Industrial Relations Legislation Amendment Act 1990* (Cwlth). That Act repealed section 118 and re-enacted it in substantially the same form as section 118A of the Industrial Relations Act. Under section 118A the commission has the same powers as it did under section 118(3) (see above) except that the requirement that they may only be exercised in relation to demarcation disputes has been removed. Further, the commission is now required to consider whether it should consult peak employer and union organizations about the exercise of these powers—previously it could consult these bodies but did not have to consider whether it should. Finally, the word 'must' has been substituted for the word 'shall' in the provision requiring the commission to 'have regard to any agreement or understanding of which the Commission becomes aware that deals with the right of an organisation of employees to represent under the Act the industrial interests of a particular class or group of employees' (s. 118A(2)(c)). This seems to now make the requirement mandatory rather than merely directory. A question that remains unanswered is whether the ACTU's policy regarding 'principal unions, significant unions and other unions' is an 'agreement or understanding' within the meaning of section 118A.

### **The Charles David Case: the genesis of a labour court?**

The Industrial Relations Commission is not a court and cannot exercise judicial powers. This is of course trite law and history. Even basic industrial relations texts relate the effects of the High Court's decision in the *Boilermakers Case*<sup>25</sup> in 1956, whereby the predecessor to the Australian Conciliation and Arbitration Commission, the Court of Conciliation and Arbitration, was ruled to be unconstitutional because it exercised both judicial and non-judicial (arbitral) powers. However, the arbitral successor to that court, the Australian

Conciliation and Arbitration Commission, and its successor, the Industrial Relations Commission, have always sought to maintain an equivalent standing with the judicial successors to the Court of Conciliation and Arbitration, namely the Australian Industrial Court and its successor since 1976, the Federal Court of Australia, Industrial Division. Indeed, deputy presidents of the Industrial Relations Commission were, until the end of 1990, paid the same salaries as were judges of the Federal Court of Australia. Moreover, until the enactment of the Industrial Relations Act in 1988, all presidential members of the Australian Conciliation and Arbitration Commission with appropriate legal qualifications were titled 'Mr Justice', reflecting not just the legacy of the earlier court but also attempts to maintain the status of the commission in the eyes of the community. Since the passing of the 1988 Act, newly appointed presidential members of the commission with legal qualifications no longer hold that title. Moreover, the nexus between the salaries of presidential members of the commission and judges of the Federal Court has now been broken. It was widely reported in the media during the latter part of 1990 that the severing of this nexus and the apparent failure of the ACTU to support the commission's opposition to the severing of the nexus have caused rifts between the commission and the ACTU, as well as between the commission and the federal government.

Apart from matters such as title and salary, there are other legal mechanisms that play a role in fixing the status and station of the commission, particularly relative to the industrial division of the Federal Court. The first is section 39B(2)(a) of the Judiciary Act (Cwlth), which prevents the Federal Court from exercising judicial review of decisions and proceedings in the commission. The provision effectively reserves this jurisdiction to the High Court of Australia. Yet in this regard the commission is unique. Every other Commonwealth tribunal or administrative body which is 'an officer of the Commonwealth' for the purposes of section 75(v) of the Constitution is amenable to judicial review by the Federal Court. Reflecting the perceived equal standing of the commission and the Federal Court is the absence of appeal rights from a full bench of the commission and, in consequence of section 39B of the Judiciary Act, a right only to seek review of the commission's decisions on limited constitutional grounds, and only in the High Court.

Another and equally important mechanism for protecting the status of the commission vis-a-vis the Federal Court is section 150 of the Industrial Relations Act, which provides that an award of the commission is final and conclusive, shall not be challenged, appealed against, reviewed, quashed or called into question in any court and is not subject to prohibition, mandamus or injunction in any court of any account. In the field of public law such a provision is known as a private clause, and the intention of such clauses should be obvious from the language of section 150. The intended effect of section 150 in the context of the Industrial Relations Commission and the Federal Court can be illustrated by the following example. Suppose a union seeks to prosecute an employer for breach of an award. Section 178(1) of the Industrial Relations Act provides that where a person bound by the award breaches a term of the award, a penalty may be imposed by the Industrial

Division of the Federal Court. But suppose an employer raises by way of defence an argument that they were not bound by the award because it was not properly made by the commission, for instance, because there was no interstate industrial dispute in existence prior to the making of the award. If such a defence could be raised, it would require the Federal Court to review the entire award making process undertaken by the commission. It might require the Federal Court to receive evidence for the purpose of determining whether the award was or was not within the constitutional jurisdiction of the commission. Further, it might require the court to receive evidence to determine whether the member of the commission who made the award did or did not act bona fide in the course of his authority under the Act. It would be understandable if the commission took the view that such proceedings would be an unwarranted intrusion by the Federal Court into its adjudicative processes.

In the past, such intrusions could not generally have occurred because of a generous interpretation of the predecessor to section 150 of the Act, section 60 of the Conciliation and Arbitration Act, by the Federal Court of Australia in *Roundstreet Pty Ltd v. Brown*.<sup>26</sup> However, in the Charles David Case the High Court of Australia decided that section 60 (and by implication its successor, section 150) should be interpreted restrictively. Thus the Federal Court could, in a case such as the example stated above, review whether an award (or a provision in an award) is within the ambit of the parliament's legislative power under the Constitution and also, unless three conditions are satisfied, review whether the award was properly made under the statute. The three conditions the award must satisfy in order to attract the protection of the privative clause are:

1. that it represents a bona fide attempt by the Commission to exercise its powers;
2. that it relates to the subject matter of the legislation; and
3. that it is reasonably capable of reference to the power given to the Industrial Relations Commission.

The effect of the decision is that in many award prosecutions it will not be possible for employers to challenge the validity of awards they are alleged to have breached, and in the process the Federal Court will be required to carefully scrutinize the activities of the commission.

One obvious solution to the dilemma posed by the Charles David Case is to create a labour court along the lines suggested in the Hancock Report. The Hancock Report recommended the creation of a court which would have all the powers of the industrial division of the Federal Court, including jurisdiction over prosecutions for breach of awards. It was also recommended that the court should be constituted by the legally qualified presidential members of the commission. In late 1990 the Confederation of Australia

26. (1987) 14 FCR 50.

27. *O'Toole v. Charles David Pty Ltd* (1990) 64 ALJR 618.

28. Committee of Review into Australian Industrial Law and Systems. *Report*, vol. 2 (1987). Canberra, AGPS.

Industry publicly called for the creation of such a labour court, and it is believed that the Charles David Case has led to support for such a court from within the commission itself.<sup>29</sup> The impetus for the creation of such a court is also assisted by some obiter dicta in the joint judgement of Justices Deane, Gaudron and McHugh in the Charles David Case itself. There, they suggested that if an appropriate mechanism had been created whereby a person affected by a proposed award could challenge the constitutional validity of the steps taken by the commission in the course of the making of the award and of the purported award itself, then a privative clause such as section 150 could have operated to prevent any future judicial challenge. They said:

. . . the Parliament can confer validity upon a purported order of a tribunal which would otherwise be without constitutional foundation if so to do can reasonably be seen as necessary and incidental to the effective discharge by that tribunal of its legitimate and constitutionally valid functions . . . the circumstances in which the conferral of such constitutional validity could properly be seen as necessary and incidental in that sense are necessarily confined . . . They will not exist unless there are appropriate and adequate means of legal challenge (i.e. in judicial proceedings) to the constitutional validity of the relevant orders at a stage or stages before the validating provisions become applicable.<sup>30</sup>

It is likely that a mechanism for the validation of federal awards, such as described above, could be created in the context of a new labour court. Whether such a body will be created in the near future remains to be seen, of course.

### **Dobinson v. Crabb<sup>31</sup>**

On 14 April 1986 the BLF was deregistered by virtue of the *Builders Labourers Federation (Cancellation of Registration) Act 1986* (Cwlth). Because so few federally registered unions had previously been forcibly deregistered, there has been only limited judicial analysis of the legal status of, and the statutory provisions governing, a deregistered union. The *Conciliation and Arbitration Act 1904* provided very little guidance. Section 143(6) of that Act provided only that:

Upon the cancellation of the registration of an organisation, the organisation shall cease to be a organisation and a corporation under this Act, but shall not by reason of the cancellation cease to be an association. The property of the organisation shall, subject to any order which the Court, upon application by a person interested, may make with respect to the satisfaction of the debts and obligations of the organisation out of that property, be the property of the association and shall be held and applied for the purposes of the association in accordance with the constitution and rules of the organisation insofar as they can be carried out or observed notwithstanding the deregistration of the organisation.

29. Though it is not clear how widespread this support is—see ‘IRC shake-up to be considered by Government’, *Financial Review*, 30 January 1991.

30. 64 ALJR 618 at 642.

31. (1990) 64 ALJR 501.

In *Dobinson v. Crabb* the High Court had to consider the effect of this provision in order to determine the wider issues in the case (which will be spelt out below). It is important to note that the provisions of section 143(6) are largely mirrored in section 298 of the Industrial Relations Act. Thus the court's analysis of section 143(6) has a continuing relevance.

The reason why the court had to consider the effect of section 143(6) was that special legislation to deal with the deregistered BLF had also been passed in Victoria (as it was also in other states). The Victorian legislation was the *Builders Labourers Federation (De-recognition) Act 1985*. Readers may recall that this Victorian legislation was amended by the *Builders Labourers Federation (De-recognition) (Amendment) Act 1987* to retrospectively validate a police raid on the BLF headquarters in Melbourne which had occurred on 13 October 1987.<sup>32</sup>

Section 7(1) of the amended De-recognition Act made provision for the making of orders about the control of BLF funds or property. The section provides:

For the purpose of protecting the rights of persons who are or have ceased to be members of BLF, the Governor in Council may by Order published in the *Government Gazette* provide for the restriction or distribution of the use of funds or property of BLF and for the control, vesting and realization of those funds or that property.

An Order in Council was made under the section on 13 October 1987, and it appointed Ian Sharp as the custodian of the funds and property of the BLF, gave him possession, custody and control of those funds and property, and furthermore gave him exclusive power to authorize the payment or disposition of any of the funds or property of the BLF as well as power to pay or direct any person to pay from the funds or property of the BLF sums of money which appeared to him in his absolute discretion to be desirable to be made for the carrying out of the ordinary and proper affairs of the BLF and for the benefit of its members. A further Order in Council of 10 November 1987 provided that the custodian may vest in himself as custodian any funds or property of the BLF and also empowered him to use BLF funds and property to set off the administration costs of his custodianship.

Dobinson was a member of the federal management committee of the deregistered BLF, and he brought these proceedings with other members of the management committee alleging that section 7 of the De-recognition Act was inconsistent with section 143(6) of the Conciliation and Arbitration Act, and that accordingly, pursuant to section 109 of the Constitution, it was invalid. Of course, if this argument succeeded, the custodian would be stripped of his powers to deal with BLF funds and property, which would then revert to the control of the federal management committee. It was argued that there was both direct inconsistency and indirect inconsistency in the sense that section 143(6) covered the field of what is to happen to the property which

32. See further, Smith, G., 'Victorian Government's BLF Raid', (1987) *Legal Service Bulletin* vol. 12, p. 279.

previously belonged to the union after cancellation of registration and pending re-registration at a later date.

Determining questions of inconsistency under section 109 of the Constitution is one of the most vexed issues in federal industrial relations in Australia.<sup>33</sup> It will come as no surprise to readers familiar with the jurisprudence on this question that the High Court split 2/3 on the question. A majority (Justices Dawson and McHugh and Justice Toohey) held that there was no direct or indirect inconsistency, whereas the minority (Justice Gaudron and Justice Brennan) held that there was direct inconsistency between section 7 and section 143(6), but no indirect inconsistency. The majority view is perhaps best summed up by Justices Dawson and McHugh, as follows:

The submission that there is otherwise a direct conflict between the Commonwealth and State provisions and the submission that the Commonwealth has evinced an intention to cover the field, whilst put separately, really merge into the one contention. That is to say, if the appellants are right in their argument that s. 143(6) says what is to happen to the property of the de-registered organisation to the exclusion of any other legislative provision, then there is a conflict in both senses. But in our view what s. 143(6) does is to provide for the destination of an organisation's property upon de-registration. Thereafter, subject to any order of the Federal Court, the association, to which the property is destined by the subsection, holds that property in accordance with the constitution and rules of the organisation, but subject to the common or statutory law applying to unincorporated associations. Obviously, since deregistration takes the association outside the mechanism of the *Conciliation and Arbitration Act* that law is primarily State law.<sup>34</sup>

The effect of the decision is that the De-recognition Act, and the Orders in Council made under it, are valid laws and the funds and property of the BLF will continue to be under the control of the custodian and the Victorian government if it chooses to make further orders under section 7 of the De-recognition Act.

### Unfair dismissal in Victoria

The 1980s saw the emergence in Australia of significant institutional mechanisms for dealing with unfair dismissals and, in particular, the clothing of industrial tribunals with the power to award reinstatement and/or compensation. These developments were most rapid and more spectacular in Victoria than in any other jurisdiction.<sup>35</sup> The explosion began with the amendment in 1983 of the *Industrial Relations Act 1979* (Vic.). Those amendments gave to the conciliation and arbitration boards (the primary industrial tribunals in Victoria), the power to deal with dismissals or threatened dismissals which are 'harsh, unjust or unreasonable'. The amendments also empowered the boards to reinstate a dismissed employee if a finding as to the harshness, unjustness or unreasonable nature of the dismissal were made.

33. See further McCallum, R. C., Pittard, M. and Smith, G. F., *Australian Labour Law: Cases and Materials*, Sydney, Butterworths, 1990, chapter 9.

34. 64 ALJR 501 at 506. Downloaded from [jir.sagepub.com](http://jir.sagepub.com) at University of Newcastle on June 13, 2012

35. See generally Benson, J., Griffin, G. and Soares, K., 'The Impact of Unfair Dismissal Legislation in the Victorian Jurisdiction', *Australian Journal of Labour Law* 2, 1989, p. 141.

In addition to the remedy of reinstatement, the boards were given the limited power to award compensation for lost wages between the date of dismissal and the date of reinstatement.

These amendments were placed in the same section of the Act as the general award making power of the boards, and this has resulted in considerable uncertainty as to the relationship between the general award making power and the more specific reinstatement and compensation provisions. This confusion is further exacerbated by other events in 1983. Before the amendments were made, the Victorian Supreme Court had ruled that the general award making power did not include a power to reinstate, and indeed the amendments were made to give the boards the express power to do so. However, virtually simultaneously with the making of the amendments, the High Court of Australia, in *Slonim v. Fellows*,<sup>36</sup> ruled that the general award making power did include a power of reinstatement, thus implicitly overruling the Victorian Supreme Court. The question then arose—did the 1983 amendments implicitly repeal any power of reinstatement which the High Court had found to be within the general award making power? Further, did the express reinstatement provisions constitute an exclusive code, thereby preventing the Industrial Relations Commission of Victoria (as distinct from the board) from exercising reinstatement powers and also preventing the boards from exercising a general compensation power?

One further complication was introduced by the 1983 amendments. Prior to the amendments, the general award making power (section 34(1)) empowered a board to make an award relating to any industrial matter whatsoever and in particular, without affecting the generality of that power, to make an award determining all matters relating to: '(f) industrial disputes'. 'Industrial dispute' was defined in section 3(1) of the Act as meaning:

A dispute arising between an employer and one or more of his employees, or between an association of employees and one or more employers or associations of employers . . .

As stated above, in *Slonim v. Fellows* the High Court held that section 34(1) allowed the boards to order the reinstatement of an unfairly dismissed employee, but they also held that the dismissal must involve a dispute of an industrial nature—in other words, that there must be some kind of real or threatened industrial dislocation or disagreement in a collective sense.

The 1983 amendments altered the definition of 'industrial dispute' in the Act so that it reads, 'a dispute arising between an employer and one or more of his employees . . . and includes . . . a dispute arising from the dismissal or threatened dismissal from his employment of an employee' (emphasis added). It is to be noted that the amended definition includes words in the singular and thus seems to clearly envisage that an individual employee is, under the Act, capable of creating an industrial dispute about his or her dismissal over which a board will have jurisdiction. Of course, as Justice Vincent pointed out in *R. v. Marshall; Ex parte Tuccitto*:<sup>37</sup>

36. (1984) 154 CLR 505.

37. (1985) 2 VIR at 131.

The matter must arise as a matter of industrial relations and not in terms of the existence of a breach of a contract of service simpliciter or the entitlement of an employer to terminate such a contract.

But in general, a claim that the dismissal was harsh, unjust or unreasonable would normally satisfy this criterion.

Between 1983 and 1990 a series of decisions by both the Industrial Relations Commission of Victoria and the Supreme Court of Victoria<sup>38</sup> expanded the jurisdiction of the boards and the Victorian commission so that, broadly speaking, the jurisdiction to deal with unfair dismissals was as follows:

- Any individual employee in Victoria (apart from public servants, teachers and the police) could claim unfair dismissal whether they were a member of a union or not.
- If the dismissed employee was seeking reinstatement, she or he had to lodge her or his application within four business days of the dismissal.
- If the dismissed employee was only seeking compensation, the dismissed employee had to lodge his or her application within a reasonable time from the dismissal.
- The boards did exercise a general power of compensation for unfair dismissal.
- If there was no board with jurisdiction over an applicant, the commission had equivalent reinstatement and compensation powers (to the boards).
- There was no need for an individual employee to create or be part of an industrial dispute about the dismissal in the sense that collective dislocation had occurred or was threatened.

In two decisions in 1990, *Casamento Management*<sup>39</sup> and *Trans Waste v. Downey*<sup>40</sup> the Full Court of the Supreme Court of Victoria swept much of this jurisdiction away. It is impossible in the space available to explain in detail the basis of the Supreme Court decisions. Excellent analyses of these decisions have already been published in the *Australian Journal of Labour Law*.<sup>41</sup> However, the essence of the reasoning of the Supreme Court in these decisions may be summarized as follows:

In the first place, the Supreme Court took the view that the 1983 amendments to the Act constituted an exclusive code pursuant to which the boards could exercise a reinstatement jurisdiction. This means that the commission (as distinct from the boards) cannot entertain unfair dismissal claims otherwise than by way of appeal from a board. It also means that the boards do not have a general power to compensate employees in respect of unfair dismissals.

Secondly, if an employee does not come within the jurisdiction of any board, he or she has no right to claim unfair dismissal at all. This has particular implications for managerial employees who are, at the present and in consequence of these decisions, seeking the creation of a managerial and

38. See, for instance, *Royal Children's Hospital v. President of the Industrial Relations Commission* (1989) VR 527; *Coleman v. Aluminium Anodisers Pty Ltd (No. 3)* (1988) 30 AILR 474.

39. Kaye, Murphy and Brooking JJ, unreported, 20 February 1990.

40. Kaye, Murphy and Brooking JJ, unreported, 24 April 1990.

41. See Pittard, M. (1990) 3 AJLL 186 and Bourke, J. (1990) 3 AJLL 189.

administrative employees board so that they are not excluded from the jurisdiction.

Thirdly, given the acceptance of the code argument above, employees must make application in respect of their dismissal within four business days of their dismissal.

Fourthly, the Supreme Court held that it is not enough that a dismissed employee claims that dismissal was harsh, unjust or unreasonable, but that it must in addition give rise to industrial dispute in the sense that collective dislocation must arise. In general this would be impossible to achieve unless the employee is a member of a union, so non-unionists will be largely excluded from the jurisdiction.

This aspect of the Supreme Court's decision has been widely criticized on two grounds. Firstly, it seems to ignore the plain words of the definition of industrial dispute in the Act (as amended). Secondly, the court relied upon the decision of the High Court in *Slonim v. Fellows*, which was decided in reference to the legislation as it was prior to the 1983 amendments. In any case, the Supreme Court adopted a view of the notion industrial dispute analogous to the High Court's interpretation of that term in the context of section 51(35) of the Australian Constitution, which, it is argued, is totally inappropriate.

In any event, the decision of the Supreme Court in the *Trans Waste Case* has been appealed to the High Court of Australia, and that appeal was heard in late 1990. It is to be hoped that much of the uncertainty surrounding the unfair dismissal jurisdiction in Victoria will be resolved by the High Court decision. It should also be mentioned that the Victorian government introduced a bill (the Industrial Relations Bill 1990) into the Victorian Parliament in late 1990 to replace the 1979 Industrial Relations Act and that Bill completely rewrites the unfair dismissal jurisdiction of the Victorian commission and boards. One way or another, 1991 will see a significant clarification of this jurisdiction.